**APPENDIX B**

**[Filed June 20, 1996]**

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

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| TONY PROTOPAPPAS,<br><br>Petitioner,<br><br>v.<br><br>JOHN M. RATELLE, Warden, et al.,<br><br>Respondents. | Civil No. CV 95-4362-ABC (Mc)<br><br>ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE |

Pursuant to 28 U.S.C. section 636(b)(1)(B), the court has reviewed the pleadings and other papers herein, the Report and Recommendation of the United States Magistrate Judge, and the objections thereto, and approves and adopts the Magistrate Judge's findings, conclusions and recommendations. The court has made a de novo determination of those portions of the report to which objection has been made.

IT IS ORDERED that the Clerk shall serve copies of this Order and the Judgment by United States Mail on the petitioner and the Attorney General for the State of California.

Dated: June 14, 1996

AUDREY B. COLLINS
United States District Judge

# APPENDIX C

**APPENDIX C**

**[Filed April 10, 1996]**

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

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| TONY PROTOPAPPAS, | ) Civil No. |
| | ) CV 95-4362-ABC (Mc) |
| Petitioner, | ) |
| | ) REPORT AND |
| v. | ) RECOMMENDATION |
| | ) OF UNITED STATES |
| JOHN M. RATELLE, | ) MAGISTRATE JUDGE |
| Warden, et al., | ) ON A PETITION |
| | ) FOR WRIT OF HABEAS |
| Respondents. | ) CORPUS BY A PERSON |
| | ) IN STATE CUSTODY |

This Report and Recommendation is submitted to the Honorable Audrey B. Collins, United States District Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

## BACKGROUND

The petitioner is a state prisoner in the R.J. Donovan Correctional Facility in San Diego, California. Following a jury trial in the Orange County Superior Court, the Petitioner was convicted of three counts of second degree murder on July 31, 1984. (Petition, p. 3; Answer, p. 2). On October 22, 1984, the petitioner was sentenced to three concurrent terms of 15 years to life in the state prison.

The Court of Appeal affirmed the petitioner's conviction on May 13, 1988. (Lodgment Item #5.). The petitioner alleges that he filed a petition for review in the California Supreme Court which the California Supreme Court denied on July 20, 1988. (First Amended Petition, p. 3). On January 6, 1994, the petitioner filed a petition for writ of habeas corpus with the California Supreme Court in which he claimed that he was denied the effective assistance of counsel because both his trial counsel and appellate counsel failed to challenge the constitutionality of California's reasonable doubt jury instruction, CALJIC No. 2.90. (Lodgment Item #1, p. 4). The California Supreme Court denied that petition on January 26, 1994. On December 22, 1994, the petitioner filed a seeond habeas petition in the California Supreme Court, raising 48 claims, including the ineffective assistance of counsel claim raised in the first state habeas petition. (Lodgment Item #3). On May 24, 1995, the California Supreme Court denied that second habeas petition "on the merits and for lack of diligence." (Lodgment Item #4).

The petitioner filed the present petition for federal habeas relief in this court on June 30, 1995. The petitioner filed a First Amended Petition for Writ of Habeas Corpus on August 2, 1995, raising 48 individual claims alleging the following constitutional violations: (1) the petitioner was denied the effective assistance of trial counsel in violation of the Sixth Amendment (First Amended Petition, pp. 12-57); (2) the petitioner was denied the effective assistance of appellate counsel in violation of the Sixth Amendment (First Amended Petition, pp. 57-76); (3) the petitioner was denied a fair and impartial trial because of the trial court's abuse of discretion, misconduct, bias and prejudice (First Amended Petition, pp. 76-92); (4) the petitioner was denied equal protection and due process because of the prosecutor's invidiously discriminatory prosecution (First Amended Petition, pp. 92-95); and (5) the petitioner was denied a fair and impartial trial because of prosecutorial

misconduct during closing arguments (First Amended Petition, pp. 97-112). On October 16, 1995, the respondent filed an answer to the petitioner's first amended petition. The petitioner filed a traverse on November 21, 1995.

## DISCUSSION

### A. Procedural Default

In a federal habeas petition, the federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." Coleman v. Thompson, 501 U.S. 722, 729, 111 S.Ct. 2546, 2553-54, 115 L.Ed.2d 640 (1991); Harris v. Reed, 489 U.S. 255, 260, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). The independent and adequate state ground doctrine has been routinely applied to bar federal habeas relief when a state court declines to address a state prisoner's federal claims on the ground that the prisoner had failed to comply with a state procedural requirement. In such cases, the state judgment rests upon an independent and adequate state procedural ground. Coleman v. Thompson, 501 U.S. at 729-30. A petitioner, however, may overcome the procedural bar if he "can demonstrate cause for the procedural default and actual prejudice, or demonstrate that the failure to consider the claims will result in a fundamental miscarriage of justice." Noltie v. Peterson, 9 F.3d 802, 805 (9th Cir. 1993) (citing Coleman v. Thompson, 501 U.S. at 749-50).

"[I]f a state court clearly and expressly states that consideration of a federal constitutional claim is barred because of an adequate and independent state law ground, federal review is foreclosed notwithstanding the fact that relief was denied on merits in an alternative holding." Anselmo v. Sumner, 882 F.2d 431, 433 (9th Cir. 1989) (citing Harris v. Reed, 489 U.S. at 204, n. 10; but see

Siripongs v. Calderon, 35 F.3d 1308, 1317-18 (9th Cir. 1994), cert. denied, __U.S._, 115 S.Ct. 1175, 130 L.Ed.2d 1127 (1995).

Before filing the present petition, the petitioner filed a petition for review and two petitions for writ of habeas corpus with the California Supreme Court. The petitioner filed his first state habeas petition in the California Supreme Court on January 6, 1994, almost ten years after his conviction. The first state habeas petition claimed that the petitioner was denied the effective assistance of counsel because both his trial counsel and appellate counsel failed to challenge the constitutionality of CALJIC 2.90. (Lodgment Item #1, pp. 2, 4). The California Supreme Court denied that petition on the merits. Harris v. Superior Court, 500 F.2d 1124, 1128 (9th Cir. 1974), cert. denied, 420 U.S. 973, 95 S.Ct. 1394, 43 L.Ed.2d 652 (1975).

On December 22, 1994, the petitioner filed his second state habeas petition raising the same 48 claims he is now attempting to raise in the present petition. The California Supreme Court denied the petitioner's second state habeas petition "on the merits and for lack of diligence." (Lodgment Item #3). By this phrase, the California Supreme Court clearly and expressly stated that, in addition to denying the petition on the merits, it was denying the petitioner's second state habeas petition on procedural grounds, i.e., for lack of diligence. The California Supreme Court clearly identified the single basis of its procedural bar - lack of diligence. Thus, this case is not one in which the federal court must speculate regarding the basis of the procedural bar asserted by the California Supreme Court. See Siripongs v. Calderon, 35 F.3d at 1317.

It appears that the California Supreme Court's denial of the second state habeas petition on procedural grounds only affects 47 of the 48 claims raised in that petition. By its ruling on the petitioner's first habeas petition, the California Supreme Court had already denied the petitioner's claim that he was deprived of the effective

assistance of counsel because both trial counsel and appellate counsel's failed to challenge CALJIC 2.90. It is thus improbable that the California Supreme Court denied that claim on a procedural ground when the petitioner re-asserted that claim in his second state habeas petition.

This court therefore must determine whether the California Supreme Court denied 47 of the 48 claims raised in the second state habeas petition on an independent and adequate state procedural ground. States are free to construct rules governing the timeliness of raising constitutional claims. Williams v. Georgia, 349 U.S. 375, 382-83, 75 S.Ct. 814, 99 L.Ed.2d 1161 (1955); Ford v. Georgia, 498 U.S. 411, 423, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991); Deere v. Calderon, 890 F.Supp. 893, 897 (C.D. Cal. 1995). California has longstanding rules regulating the availability of state habeas relief for state criminal defendants. Deere v. Calderon, 890 F.Supp. at 897. The California Supreme Court has consistently required that, in habeas corpus proceedings, a petitioner must justify any substantial delay in seeking relief. In re Clark, 5 Cal.4th 750, 765, 783, 21 Cal.Rptr.2d 509, 855 P.2d 729 (1993); In re Swain, 34 Cal.2d 300, 302, 209 P.2d 793 (1949); cert. denied, 338 U.S. 944, 70 S.Ct. 425, 94 L.Ed.2d 582 (1950); In re Stankewitz, 40 Cal.3d 391, 396 n. 1, 220 Cal.Rptr. 382, 708 P.2d 1260 (1985). By expressly denying the petitioner's second state habeas petition "for lack of diligence," in addition to denying it on the merits, the California Supreme Court denied the petition on an independent and adequate state procedural rule. Coleman v. Thompson, 501 U.S. at 729-30; Anselmo v. Sumner, 882 F.2d at 433.

The California Supreme Court clearly and expressly denied the petitioner's second state habeas petition on an independent and adequate state procedural ground. This court is foreclosed from reviewing 47 of the petitioner's 48 claims, unless the petitioner can establish cause for the procedural default and the actual prejudice, or can demonstrate that the failure to consider the claims will result in a fundamental miscarriage of justice.

Anselmo v. Sumner, 882 F.2d at 433; Noltié v. Peterson, 9 F.3d at 805.

Here, the petitioner argues that the delay in raising his 48 claims was caused by the following: (1) there was a conflict between his work hours and library hours; (2) it took approximately one year before the petitioner received the trial record; and (3) the petitioner was not knowledgeable enough to recognize the existence of facts supporting many meritorious claims. (Traverse, pp. 12-16). These reasons manifestly do not demonstrate adequate cause for the delay of more than 10 years after the conviction before first presenting the 47 claims to the California Supreme Court. Even assuming that these reasons are adequate to establish cause, the petitioner has failed to establish actual prejudice. Noltie v. Peterson, 9 F.3d at 805. Moreover, the petitioner has not demonstrated that the failure to consider the claims will result in a fundamental miscarriage of justice. Id. Based on the foregoing, it appears that 47 of the petitioner's 48 claims are procedurally barred from federal habeas review.

**B. Ineffective Assistance of Counsel**

The petitioner claims that he was denied the effective assistance of counsel because both trial counsel and appellate counsel failed to challenge the constitutionality of CALJIC 2.90, the California reasonable doubt instruction. Specifically, he argues that CALJIC 2.90 reduced the standard of proof from evidentiary or factual certainty to moral certainty which is a quantum less than that required by the Constitution. The petitioner's claim is without merit.

To show ineffective assistance of counsel, the petitioner must demonstrate that his counsel's performance was deficient, and that the deficient performance prejudiced his defense. Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 842, 122 L.Ed.2d 180 (1993), Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct.

2052, 80 L.Ed.2d 674 (1984). The standard for assessing the performance of appellate and trial counsel is the same. Alford v. Rolfs, 867 F.2d 1216, 1220 (9th Cir. 1989).

This court must determine whether the petitioner's trial counsel's and appellate counsel's failure to challenge CALJIC 2.90 amounted to deficient performance. The failure to make a futile motion or argument does not constitute ineffective assistance of counsel. James v. Borg, 24 F.3d 20, 27 (9th Cir. 1994), cert. denied, __U.S.__, 115 S.Ct. 333, 130 L.Ed.2d 291 (1994); United States v. Zazzara, 626 F.2d 135, 138 (9th Cir. 1980).

In a criminal case, the government must prove every element of a charged offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The United States Supreme Court has directly held that CALJIC 2.90, the standard California reasonable doubt instruction, correctly conveys the concept of reasonable doubt, and that there is no reasonable likelihood that the jurors would understand that instruction to allow a conviction based on proof insufficient to meet the Winship standard. Victor v. Nebraska, __U.S.__, 114 S.Ct. 1239, 1241, 1243, 1247-8, 1250; 127 L.Ed.2d 583 (1994). In effect, the holding in Victor v. Nebraska is that the use of CALJIC 2.90 does not constitute a constitutional violation. It would have been an exercise in futility for either trial counsel or appellate counsel to challenge the constitutionality of CALJIC 2.90. Therefore trial counsel's and appellate counsel's failure to challenge CALJIC 2.90 did not constitute ineffective assistance of counsel. James v. Borg, 24 F.3d at 27.

## RECOMMENDATION

The magistrate judge therefore recommends that the court issue an order: (1) approving and adopting this Report and Recommendation; and (2) directing that

judgment be entered denying the petition on the merits as to all claims.

Dated: April 10, 1996

*JAMES W. McMAHON*
United States Magistrate Judge